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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL MOTORS CORPORATION,
Petitioner,

v.

LEE M. THOMAS, ACTING ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

William L. Weber, Jr.
George F. Ball
Thomas L. Arnett
GENERAL MOTORS CORPORATION
3044 West Grand Blvd.
Detroit, Michigan 48202
(313) 556-4009

Theodore Souris
James A. Smith
Terrence B. Larkin
Robert M. Spence
BODMAN, LONGLEY & DAHLING
34th Floor
100 Renaissance Center
Detroit, Michigan 48243
(313) 259-7777

Edward W. Warren
(Counsel of Record)
David G. Norrell
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5018

Attorneys for Petitioner General Motors Corporation
January 7, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in applying the interpretative rule exception from the notice and comment procedures of the Administrative Procedure Act and the Clean Air Act to uphold a regulation that implements an agency's substantive policy determinations and has a substantial impact on regulated parties?

2. In reviewing a regulation treated as "interpretative," did the Court of Appeals err by applying the highly deferential standard of review for legislative regulations this Court enunciated in *Chevron* v. *NRDC*, 104 S. Ct. 2778 (1984)?

3. Did the Court of Appeals err in sustaining an EPA regulation extending motor vehicle manufacturers' emissions recall liability beyond the statutorily prescribed 5 year/50,000 mile "useful life" to include all vehicles regardless of age or mileage?

PARTIES TO THE PROCEEDINGS

Petitioner General Motors Corporation was the petitioner in the Court of Appeals. Respondent Lee M. Thomas is the Acting Administrator of the U.S. Environmental Protection Agency, which issued the rule and final determination reviewed by the Court of Appeals. There are no other parties to this case.

Pursuant to Supreme Court Rule 28.1, GM's non-wholly owned subsidiaries and affiliates are:

Aralmex, S.A. de C.V. (Mexico)
Automotriz Gencor S.A. (Ecuador)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Compresores Delfa, C.A. (Venezuela)
Convesco Vehicle Sales GmbH (West Germany)
Daewoo Motor Co., Ltd. (Korea)
DHB—Componentes Automotivos S.A. (Brazil)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Columbia)
General Motors de Colombia S.A. (Columbia)
General Motors Egypt, S.A.E. (Egypt)
General Motors Iran Limited (Iran)
General Motors Kenya Limited (Kenya)
GM Allison Japan Limited (Japan)
GM Fanuc Robotics Corp. (USA)
Industries Mecaniques Maghrebires, S.A. (Tunisia)
Industrija Delova Automobila, Kikinda (Yugoslavia)
Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)

Moto Diesel Mexicana, S.A. de C.V. (Mexico)
Motor Enterprises, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
Omnibus BB Transportes, S.A. (Ecuador)
Promotora de Partes Electronicos Automotrices (Mexico)
P.T. Mesin Isuzu Indonesia (Indonesia)
Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)
Suzuki Motor Co., Ltd. (Japan)
Unicables, S.A. (Spain)

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IN THE

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OCTOBER TERM, 1984

GENERAL MOTORS CORPORATION,
Petitioner,
v.
LEE M. THOMAS, ACTING ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, General Motors Corporation, respectfully requests that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the District of Columbia Circuit entered on September 7, 1984.

OPINIONS BELOW

The opinions of the Court of Appeals issued after rehearing *en banc* are published at 742 F.2d 1561 and are reprinted in the Appendix as App. A. The panel opinions of the Court of Appeals are published at 724 F.2d 979 and are reprinted as App. B. The Court of Appeals' rehearing orders and judgment are included as App. C and App. D, respectively. The "Interpretive Rule" promulgated by respondent and its June 23, 1980 final action are reprinted as App. E and App. F, respectively.

JURISDICTION

The judgment of the Court of Appeals *en banc* was entered on September 7, 1984. The Chief Justice on November 29, 1984 extended the time for filing this petition to and including January 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

STATUTES INVOLVED

The statutes and regulations involved are the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, the Clean Air Act, as amended, 42 U.S.C. §§ 7401 *et seq.*, and regulations adopted thereunder, 40 C.F.R. Part 85.

The principal provision of the Clean Air Act at issue here is § 207(c)(1),[1] which provides in pertinent part:

> "If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, *do not conform to the regulations prescribed under section 202, when in actual use throughout their useful life (as determined under section 202(d))*, he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer." (Emphasis added.)

"Useful life" is defined in § 202(d)(1) as five years or fifty thousand miles, whichever occurs first. The challenged EPA regulation provides that manufacturers must remedy all "vehicles which experienced the nonconformity during their

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[1] For the Court's convenience, citations throughout are to the sections of the Clean Air Act. Parallel citations to the U.S. Code are provided in the Table of Authorities.

useful lives *regardless of their age or mileage* at the time of repair." 40 C.F.R. § 85.1803 Appendix A (emphasis added). Other materials pertinent to the legislative history are reprinted in App. G, and to the history of the challenged regulation in App. H.

STATEMENT OF THE CASE

This is a case of first impression regarding EPA's power to expand the scope of vehicle manufacturers' emissions recall liability under the Clean Air Act. The petition squarely presents two issues of major significance in administrative law, each of which merits plenary consideration by this Court. *First*, the petition asks this Court to articulate a test which federal courts can apply consistently to distinguish between legislative and interpretative rules. *Second*, the petition establishes the need for this Court to clarify that the highly deferential standard of review for policy-based regulations articulated in *Chevron* v. *NRDC*, 104 S. Ct. 2778 (1984), does not extend to interpretative rules adopted without notice and comment rulemaking.

Statutory Background. By amendments enacted in 1970, the Clean Air Act requires that all passenger motor vehicles sold in the United States be designed, built and warranted to comply with emissions standards during their useful lives. "Useful life," in turn, is defined in § 202(d)(1) as 5 years or 50,000 miles, whichever sooner occurs. The 5 year/50,000 mile useful life period was chosen purposefully by Congress to establish a reasonable limit on vehicle manufacturers' obligations to ensure compliance with the emissions standards:

> "The manufacturers informed the Committee that they would not be able to guarantee conformity with emissions standards for the anticipated 10-year life of a vehicle. The committee bill provides that 50,000 miles would be the *maximum that a vehicle would be required to conform to the standards* for which it was certified." S. Rep. No. 1196, 91st Cong., 2d Sess. 30 (1970), *reprinted in* 1 1970

Legislative History of the Clean Air Act at 430 (emphasis added). App. G-27.

In keeping with this legislative judgment, Congress directed that a manufacturer's liability under the Clean Air Act's overlapping compliance scheme, including new model certification (§ 206(a)), assembly line testing (§ 206(b)) and defect warranty (§ 207(a)), terminates once a vehicle has attained 5 years or 50,000 miles of service.[2] The same legislative judgment is reflected in § 207(c)(1), which empowers EPA, when it determines that a substantial number of a vehicle class do not conform with applicable emissions standards during their 5 year/50,000 mile useful lives, to order a manufacturer to submit a plan for remedying the nonconformity of such vehicles at the manufacturer's expense.

The "Interpretive Rule" and the Agency's Order. On May 22, 1980, without notice and comment, EPA adopted a "nationally applicable regulation" to become effective on May 30, 1980. 45 Fed. Reg. 36396. This regulation amended 40 C.F.R. § 85.1803[3] by adding an "interpretive ruling" which, in language that is imperative, not interpretative, requires that each remedial plan:

> "provide that the manufacturer will remedy, at the manufacturer's expense, all properly maintained and used vehicles which experienced the nonconformity during their

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[2] The 1970 amendments also limited the performance warranty of emissions control components to 5 years or 50,000 miles. That warranty period continues for "sole or primary purpose" components, but was reduced for other components to 2 years or 24,000 miles by the Clean Air Act Amendments of 1977. Section 207(b).

[3] In 1974, after notice and opportunity for comment, EPA promulgated the initial regulations governing recalls. 40 C.F.R. Part 85. Section 85.1803 sets forth the required contents of recall remedial plans, including recall methodology, description of the repair, texts of repair instructions and other such information.

> useful lives *regardless of their age or mileage* at the time of repair." (Emphasis added.)

Prior to the controversy with GM in this case and the unforeseen promulgation of the above regulation, manufacturers had no hint that EPA would negate the 5 year/50,000 mile useful life limitation on recall repair liability.[4]

In March 1977, three years before the regulation was adopted, EPA had ordered GM to recall certain 1975 Cadillacs. Prior to that order, GM had volunteered to recall those cars and in April 1977, submitted a proposed remedial plan voluntarily including additional vehicles. Timely acceptance of GM's plan would have assured the eligibility for repair of all affected vehicles. Nonetheless, EPA initially rejected the GM plan.[5] After 2½ years of protracted negotiations, EPA finally accepted GM's plan in December 1979. By that time, many of the 1975 Cadillacs had exceeded their 5 year or 50,000 mile statutory useful lives. GM's final remedial plan of February 5, 1980 therefore provided that those vehicles which had exceeded their

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[4] The judges below disagreed at length whether EPA's interpretation was "longstanding" before the "need" for an "interpretative" regulation was conceived. *Compare* App. A-8 n.7 (*en banc* majority) *with* App. A-26 nn.11 & 12 (*en banc* dissent). In fact, as the factual "record" compiled by the agency confirms, the issue of the manufacturer's duty to fix cars whose useful lives had ended had been disputed only once, in a recall of certain Chrysler vehicles. *See* App. H-6. The useful life issue was not pressed in that case, however, because the initial determination of nonconformity was the focus of dispute. *Chrysler Corp.* v. *EPA*, 631 F.2d 865 (D.C. Cir.), *cert. denied*, 449 U.S. 1021 (1980).

[5] EPA insisted initially that GM audit the repaired vehicles to monitor the performance of independent dealers of GM vehicles. GM objected that such an audit and the related enforcement sanctions EPA expected GM to undertake exceeded EPA's statutory authority and would inappropriately alter GM's business relationships with its dealers. EPA ultimately withdrew its insistence on the audit and approved GM's remedial plan. *See* Ct. Appeals Joint App. 142, 145-46, 252.

useful lives would not be included because they were no longer subject to the emissions standards.

EPA did not then act on GM's final plan. Instead, to bolster a position its enforcement personnel wanted to take, EPA's staff prepared an internal memorandum "supporting need for interpretive rule on motor vehicle manufacturers' liability for repair of recall vehicles." App. H-1 (May 9, 1980). Based on that memorandum, EPA adopted its new nationally applicable regulation and made it effective upon publication, May 30, 1980. App. E-1. Three weeks later, citing the regulation, EPA ordered GM to recall and repair the 1975 Cadillacs regardless of their age or mileage or else suffer "fines of up to $10,000 per vehicle." App. F-4. On the basis of factual assumptions and policy determinations that were not tested by notice and comment rulemaking, this new regulation effectively reads the 5 year/50,000 mile limit on repair obligations out of § 207(c)(1) of the Act.

The Court of Appeals' Decisions. GM sought review in the D.C. Circuit of EPA's new regulation and its final order. On December 16, 1983, a panel of that Court vacated both. Judge Bazelon held that EPA's interpretation was entitled only to limited deference and was inconsistent with the plain statutory text and legislative history. App. B-1. Judge Wilkey filed a concurring opinion comparing four possible constructions of § 207(c)(1) and identifying the construction he believed the legislative history supported. App. B-43. Judge Wald dissented, agreeing with EPA's interpretation. App. B-47.

On EPA's petition, the court ordered rehearing *en banc*. A divided Court of Appeals thereafter upheld EPA's regulation and order, purporting to follow this Court's intervening decision in *Chevron* v. *NRDC*, 104 S. Ct. 2778 (1984). Judge Wald, writing for the *en banc* majority, accepted EPA's characterization of the regulation as interpretative and held therefore that notice and comment procedures were not necessary. The court recognized, however, that the regulation was devised to imple-

ment "EPA policy" and "policy choices" and to effectuate selected "policy goals." App. A at 8-11 & n.7, 11-12 & n.8, 13, 17, 20-22. Based on the highly deferential *Chevron* standard of review and the "respect" it believed *Chevron* mandated for those policy determinations, the majority then upheld the regulation as imposing an acceptable requirement having "adequate support" in the statute and its purpose. *Id.* at 11-23 & 11-12 n.8.

REASONS FOR GRANTING THE WRIT

The two administrative law issues presented by this petition govern both the public's opportunity to participate before an agency promulgates regulations and the standard of judicial review to be applied after regulations are adopted. Each of the issues meets the traditional standards for exercise of this Court's jurisdiction and has far-reaching implications, not only for motor vehicle manufacturers, but for all persons subject to administrative regulation.

First, the petition asks this Court to clarify the test for distinguishing between legislative regulations, which can be promulgated only after notice and comment, and interpretative rules, which are exempt from those safeguards. Although the consequences of this distinction have long been critical to the conduct of administrative proceedings and judicial review of agency regulations, this Court has never articulated a test for making the legislative-interpretative distinction. In the absence of guidance from this Court, agencies and lower federal courts have developed their own differing and often conflicting formulations.

Second, the petition asks this Court to resolve a conflict over whether the highly deferential standard of review for policy-based, legislative regulations articulated in *Chevron* v. *NRDC*, 104 S. Ct. 2778 (1984), should be extended to interpretative rules. The court below held that *Chevron* does govern review of the regulation involved here, which it had classified as inter-

pretative. At least two other circuits, in contrast, have concluded that *Chevron* does not apply to interpretative rules.

While each of these issues independently warrants granting certiorari, the issues are closely intertwined in many respects. Thus, this Court's decision in *Chevron*, especially as applied by the D.C. Circuit, also underscores the need for definitive guidance in distinguishing between legislative and interpretative regulations. In addressing the applicable standard of judicial review, *Chevron* distinguished between instances where Congress has expressed its own intent regarding an issue, leaving to agencies the effectuation of that intent, and cases where Congress "has not directly addressed the precise question." 104 S. Ct. at 2781-82. In the latter case, Congress delegates authority to the agency, either explicitly or implicitly, to resolve questions of implementation based on the agency's accomodation of competing policies and interests. Contrary to the D.C. Circuit's decision *en banc*, only regulations adopted pursuant to such delegated legislative responsibility are entitled to *Chevron*'s particularly deferential standard of review.

At the same time the D.C. Circuit has improperly extended the *Chevron* standard of review to interpretative rules, its approach ignores the lessons of *Chevron* for making the legislative-interpretative distinction. *Chevron*'s focus on whether Congress itself intended to resolve an issue, or instead left the issue for the agency to resolve in policy-based regulations, demonstrates that the EPA regulation involved here should have been treated as legislative, not interpretative. Elements of the tests employed by several other circuits also indicate the regulation is legislative. The consequence of the D.C. Circuit's conflicting approach is that EPA and other agencies will be free to make legislative policy choices without following the notice and comment requirements designed to inform agency decisionmakers. Yet, despite the absence of notice and comment, the D.C. Circuit accords to "interpretative" regulations the same high level of judicial deference that *Chevron* accords only when all procedural safeguards have been observed.

Finally, while the administrative law issues here arise in a case of great importance to GM and the automobile industry, they apply universally to all individuals and businesses affected by agency action. EPA's new regulation, by overriding the statutory useful life limitation, significantly expands the recall repair obligations of automobile manufacturers in a program that involves millions of vehicles per year. If such policy-based regulations going beyond Congress' expressed intent and having such profound impact are to be adopted—whether for the automobile industry, recipients of social security, AFDC or other benefits, or the public at large—the regulations should be recognized as legislative and adopted with the benefit of the public participation contemplated by the Administrative Procedure Act. Not only does that participation provide the information essential to reasoned decisionmaking, it is the very justification for according administrative agencies the authority to resolve such legislative issues in the first place.

I. THE "INTERPRETATIVE RULE" EXCEPTION FROM NOTICE AND COMMENT RULEMAKING SHOULD NOT EXTEND TO AGENCY REGULATIONS THAT REFLECT LEGISLATIVE POLICY JUDGMENTS MADE IN THE EXERCISE OF CONGRESSIONALLY DELEGATED AUTHORITY.

A. This Court's Guidance Is Needed To Reconcile The Conflicting Tests Applied By The Courts Of Appeals To Distinguish Between Interpretative And Legislative Regulations.

The distinction between "interpretative" and "legislative" regulations is fundamental in administrative law and has been part of the Administrative Procedure Act since its enactment. 5 U.S.C. § 553(b)(A). "Legislative" or "substantive" regulations are subject to the notice and comment requirements of the APA, whereas "interpretative" rules are exempt from those procedural safeguards. Notice and comment procedures serve both to inform the agency's decisionmaking and to assure

the integrity of the process by which an agency makes legislative or policy judgments.[6] Once adopted, legislative regulations have the force and effect of law. Interpretative rules, by contrast, have no binding effect and serve only to advise the public of an agency's construction of a statute. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301-03 (1979).

It is by legislative regulation that an agency, delegated legislative authority by Congress, implements policy choices. The agency is the final arbiter of those choices, subject only to limited judicial review as directed by Congress. On the other hand, only the judicial branch can make binding decisions on issues properly subject to treatment in interpretative rules, giving varying degrees of deference to the agency's views. *Id.* at 301-03; *Batterton* v. *Francis*, 432 U.S. 416, 425 & n.9 (1977); 2 K. Davis, *Administrative Law Treatise* § 7:13 (2d ed. 1979). Accordingly, the classification of an agency's action as legislative or interpretative significantly affects the procedures for its adoption, its legal effect and the applicable standard of judicial review.

Despite the significant implications of the distinction, this Court never has articulated a test for determining whether an agency rule is interpretative as opposed to legislative.[7] Indeed,

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[6] Specifically, § 4(b)(A) of the APA, incorporated by reference in Clean Air Act § 307(d)(1), exempts "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from notice and comment rulemaking. Although the instant regulation rested heavily on the agency's policy views, it cannot be classified as a "general statement of policy," nor has the agency attempted to invoke that exception. Because of the importance of allowing public participation and developing a sufficient record for agency decisionmaking, these exemptions are to be narrowly construed. *American Transfer & Storage Co.* v. *ICC*, 719 F.2d 1283, 1295 (5th Cir. 1983); *Northwest Airlines, Inc.* v. *Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981).

[7] The Court's decisions in *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980); *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979); *Batterton* v. *Francis*, 432 U.S. 416 (1977); and *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), address the consequences of the distinction, but do not provide a test for making the distinction.

the Court highlighted in *Chrysler* the absence of such a test and pointed out that most of the relevant sources for guidance "essentially offer definitions by negative inference." 441 U.S. at 301-02. Although certiorari was granted to consider this issue in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), the Court ultimately resolved that case on other grounds.[8] The recognized need for this Court's guidance thus remains unmet.

The court below also acknowledged that the present standards for distinguishing between interpretative and legislative rules are "'enshrouded in considerable smog.' "[9] App. A-7 (*en banc* majority). Nevertheless, based on the general principles established in its prior decisions, the Court of Appeals held that EPA's regulation extending the recall remedy was "interpretative" in nature and exempt from notice and comment procedures. First, the court gave considerable weight to EPA's "own label" of the regulation as "interpretative." *Id.* Second, the court concluded that EPA had not "*intend[ed]* to create new law, rights or duties."[10] App. A-8 (emphasis added). Al-

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[8] Specifically, the welfare rights organization presented the question whether a "substantial impact" test should be employed. Brief for Petitioner at 3, 41-47; Brief for Respondent at 3, 97-103. This Court disposed of the case on the ground, raised by the cross-petitioner, that the organization lacked standing to challenge the agency's rule.

[9] A number of commentators have lamented the absence of guidance. *See, e.g.*, M. Asimow, *Public Participation in the Adoption of Interpretative Rules and Policy Statements*, 75 Mich. L. Rev. 520, 523-24, 561 (1977); M. Warren, *The Notice Requirement in Administrative Rulemaking: An Analysis of Legislative and Interpretative Rules*, 29 Ad. L. Rev. 367, 368-74 (1977); Note, *The Interpretative Rule Exemption: A Definitional Approach to Its Application*, 15 Ind. L. Rev. 875 (1982).

[10] That the intent of the agency was critical to the court's holding is confirmed by the prior decisions from which the court drew its general principles. App. A at 7-8. *See, e.g., American Postal Workers Union* v. *United States Postal Service*, 707 F.2d 548, 558-60 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1594 (1984); *Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 876 (D.C. Cir. 1979). Moreover, while the court mentioned creation

[Footnote continued]

though not addressed explicitly in its opinion, the court's analysis also reflects the so-called "legal effect" or "binding effect" test used elsewhere by the D.C. Circuit to distinguish legislative from interpretative rules.[11]

None of these principles is adequate to provide a meaningful test. When an agency has been delegated the authority to promulgate legislative regulations, as EPA has under § 207(c)(2),[12] the test should focus on whether the agency has, in fact, exercised that delegated authority. As other courts have recognized, an agency's label and intent may bear little relationship to that inquiry, and both label and intent are far less important than the agency's actions.[13] Moreover, according significant weight to the agency's intent, label or disclaimer of binding effect carries the potential for self-serving circumvention of APA and Clean Air Act requirements.[14] Finally, the

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of new duties in its test, it conducted no analysis of the duties and obligations actually imposed by EPA's regulation. *See* pages 20-21, 27-28 *infra*.

[11] According to this test, a rule that an agency concedes will be given no legal or binding effect is considered interpretative. *See, e.g., Eastern Kentucky Welfare Rights Organization* v. *Simon*, 506 F.2d 1278, 1290 (D.C. Cir. 1974), *rev'd on other grounds*, 426 U.S. 26 (1976); *National Nutritional Foods Ass'n* v. *Weinberger*, 512 F.2d 688, 698 n.8 (2d Cir.), *cert denied*, 423 U.S. 827 (1975); *Pesikoff* v. *Secretary of Labor*, 501 F.2d 757, 763-64 n.12 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974).

[12] The distinction addressed here becomes relevant only when Congress has given an agency authority to engage in legislative rulemaking. *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976). Section 207(c)(2) of the Clean Air Act explicitly provides EPA that authority. *See also* § 301(a)(1) and § 307(d)(1)(L).

[13] *Detroit Edison Co.* v. *EPA*, 496 F.2d 244, 249 (6th Cir. 1974); *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972). *See also Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 416 (1942); *Department of Labor* v. *Kast Metals Corp.*, 744 F.2d 1145, 1149 (5th Cir. 1984) (a "paisley ribbon will not make up for damaged goods; the substance, not the label, is determinative").

[14] *See generally* M. Asimow, *supra* note 9, at 557-58; M. Warren, *supra*

[Footnote continued]

"legal effect" criterion used by the D.C. Circuit has been rejected elsewhere as mistaking the consequences of the distinction for a means to make the distinction.[15]

While the conflicting decisions by other Courts of Appeals do not provide a unified or settled alternative to the D.C. Circuit's approach, the decisions of several circuits and of this Court suggest that a primary element in making the distinction must be the existence of *congressional intent*. When Congress has actually expressed an intent in a statute or its legislative history, rules that essentially restate or explain Congress' intent may fairly be considered interpretative.[16] But when Congress has delegated to an agency the responsibility to add meaning to a provision, either by explicit direction or implicitly by not expressing any "actual intent" on an issue, the agency's implementing regulation must be legislative in nature. *See Chevron* v. *NRDC*, 104 S. Ct. at 2791, 2793 (1984); *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974). Indeed, because the touchstone of statutory interpretation is congressional intent,[17] there can be no

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note 9, at 370. The context in which the regulation challenged here was promulgated is instructive. Far from being a dispassionate exercise in publishing a notice to advise the public of an EPA construction of the statute, the interpretative regulation was an advocate's response to a specific element of a GM remedial plan to which the agency's enforcement personnel objected. *See* pages 5-6 *supra*.

[15] *See, e.g., Alcaraz* v. *Block*, 746 F.2d 593, 614 (9th Cir. 1984) (this principle "is only an effect of the distinction[,] not a criterion of distinction"). *See also Levesque* v. *Block*, 723 F.2d 175, 181-82 (1st Cir. 1983) ("[e]very rule is intended to have some effect").

[16] *See, e.g., Powderly* v. *Schweiker*, 704 F.2d 1092, 1098 (9th Cir. 1983) ("[i]nterpretative rules are those which merely clarify or explain existing law"); *Allen* v. *Bergland*, 661 F.2d 1001, 1006-07 (4th Cir. 1981) (an "interpretative rule effectuates no change in policy or law"); *Gosman* v. *United States*, 573 F.2d 31, 39 (Ct. Cl. 1978) ("merely clarifies or explains existing law or regulations"). *See also Chevron* v. *NRDC*, 104 S. Ct. at 2781-82 & n.9.

[17] *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 215 (1962); 2A J. Sutherland, *Statutes and Statutory Construction* § 45.05 (Sands 4th rev. ed. 1984).

mere interpretation in cases where Congress had no actual intent. In those situations, the agency's regulation must be legislative.

This Court's decisions suggest that a second crucial element in making the distinction must be whether an agency's regulation involves significant *policy determinations*. An agency may formulate policy or reconcile competing policies only by exercising delegated responsibility that is inherently *legislative* in nature. But an agency promulgating an interpretative regulation, drawing on actual congressional intent, need not make policy determinations because Congress already has made them. Accordingly, this Court has held that when an agency makes policy determinations to fill gaps left explicitly or implicitly by Congress, it must do so by legislative rulemaking. *Morton* v. *Ruiz*, 415 U.S. at 231-35. *Accord*, *Chevron* v. *NRDC*, 104 S. Ct. at 2793; *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 422 (1942). With few exceptions, however, *see, e.g.*, *First Bancorporation* v. *Board of Governors*, 728 F.2d 434, 438 (10th Cir. 1984), the lower federal courts have failed to recognize this basis for distinguishing legislative from interpretative regulations.

Finally, several circuits consider the *impact* of a regulation in determining whether it is legislative or interpretative. Under this approach, a regulation imposing obligations which have a "substantial impact" reflects the agency's exercise of legislative authority, provided Congress delegated such authority.[18]

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[18] *Iowa Power & Light Co.* v. *Burlington Northern, Inc.*, 647 F.2d 796 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *American Bancorporation, Inc.* v. *Board of Governors*, 509 F.2d 29, 33 (8th Cir. 1974); *Department of Labor* v. *Kast Metals Corp.*, 744 F.2d 1145, 1152-54 & n.19 (5th Cir. 1984); *American Transfer & Storage Co.* v. *ICC*, 719 F.2d 1283 (5th Cir. 1983); *Brown Express, Inc.* v. *United States*, 607 F.2d 695, 701-02 (5th Cir. 1979); *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972); *Detroit Edison Co.* v. *EPA*, 496 F.2d 244 (6th Cir. 1974); *Cerro Metal Products* v. *Marshall*, 467 F. Supp. 869, 879-80 (E.D. Pa. 1979), *aff'd*, 620 F.2d 964, 981-82 (3d Cir. 1980).

The D.C. Circuit, on the other hand, along with the Ninth Circuit and the Temporary Emergency Court of Appeals, rejects the "substantial impact" approach for distinguishing between legislative and interpretative rules.[19] To the extent this Court has mentioned the point, it has taken the view, rejected by the D.C. Circuit, that one inherent characteristic of a legislative regulation is that it " 'affect[s] individual rights and obligations.' " *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979).

Only plenary consideration by this Court can reconcile these conflicting approaches and provide lower courts the necessary guidance for distinguishing between legislative and interpretative regulations.

B. The Court Of Appeals Should Have Invalidated EPA's Regulation As Legislative Rulemaking Conducted Without Notice And Comment.

The principles applied by the Court of Appeals in determining that EPA's regulation was interpretative led it to uphold EPA's regulation extending the recall remedy despite the agency's failure to conduct notice and comment rulemaking. Yet the

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[19] *Cabais* v. *Egger*, 690 F.2d 234, 237 & n.5 (D.C. Cir. 1982) (commenting on the conflict); *American Postal Workers Union* v. *United States Postal Service*, 707 F.2d 548, 558-60 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1594 (1984); *Alcaraz* v. *Block*, 746 F.2d 593, 613 (9th Cir. 1984); *Rivera* v. *Becerra*, 714 F.2d 887, 889-91 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1591 (1984); *Energy Reserves Group, Inc.* v. *DOE*, 589 F.2d 1082, 1093-95 (Temp. Emer. Ct. App. 1978). *See American Trucking Ass'n* v. *United States*, 688 F.2d 1337, 1351-52 (11th Cir. 1982) (criticizing substantial impact test but constrained by Fifth Circuit precedent), *rev'd on other grounds*, 104 S. Ct. 2458 (1984); *Jean* v. *Nelson*, 711 F.2d 1455, 1479-80 n.20 (11th Cir. 1983) (same), *mooted prior to rehearing en banc*, 727 F.2d 957, 962 (1984).

The Ninth Circuit, in particular, has concluded that use of the substantial impact test is precluded by the holding in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), whereas the Fifth Circuit concludes that *Vermont Yankee* has no bearing on this distinction. *See Department of Labor* v. *Kast Metals Corp.*, 744 F.2d at 1154 & n.19.

Court of Appeals' opinions and the agency's treatment both establish that the regulation is inherently legislative, not interpretative, in nature. The issues resolved by EPA's regulation, including major policy determinations, thus are precisely the type which must be decided only with the benefit of public comment.

1. If Recall Liability Is To Be Extended Beyond The Statutorily Defined Useful Life For Passenger Cars, Legislative Rulemaking Is Required.

The Court of Appeals' analysis of the statute and its legislative history alone is sufficient to demonstrate the legislative nature of EPA's regulation. Congress defined the § 207(c) obligation to remedy nonconforming vehicles by explicit reference to the 5 year/50,000 mile useful life during which a vehicle must conform with emissions standards. GM argued below, therefore, that a manufacturer is not required to remedy a vehicle after its useful life has ended. EPA's argument focused on the fact that the statute requires that a recall notice be given to the owners of an entire class of vehicles. Because notice is classwide, EPA argued that every vehicle in the class which cannot be shown to have met the standards during its useful life must be repaired on recall regardless of age or mileage. The parties and the judges on the Court of Appeals all thought the language of the statute was clear on its face—but each "plain" meaning was markedly different.[20]

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[20] Judge Bazelon concluded for the panel majority and the *en banc* dissent that a manufacturer's liability for repair of a vehicle ended with its useful life, but acknowledged the possibility that EPA might adopt legislative regulations directed explicitly at delays in recall proceedings. App. B-1; App. A-24. Judge Wilkey believed that, properly interpreted, § 207(c) limits liability to vehicles still within their useful life at the time that a recall notice is given. He suggested that EPA might adopt by appropriate legislative regulation a mechanism for determining whether a vehicle was beyond useful life at that date. App. B-43. Judge Wald's panel dissent and *en banc* majority opinion agreed with EPA's interpretation. App. B-47; App. A-1.

GM contends that the only passage in the Act's legislative history bearing on the choice among these constructions of the repair obligation precludes EPA's open-ended construction. Commenting on the Senate bill provision that became § 207(c), the Senate Committee on Public Works explained that a manufacturer would not be required to repair a vehicle which had passed the 50,000 mile limit:

> "The 50,000-mile period can be assumed to be 4 to 5 years and the manufacturer should be expected to notify any owner of a vehicle that is five years old or less as to failure to continue to perform to the standard. *A decision not to require the manufacturer to repair the vehicle could be made after notice and after finding that the vehicle had exceeded the 50,000 mile warranty period.*" S. Rep. No. 1196, 91st Cong., 2d Sess. 30 (1970), *reprinted in* 1 1970 *Legislative History of the Clean Air Act* at 431 (emphasis added).

The Court of Appeals, however, dismissed the quoted legislative history as "irrelevant * * * for the purposes of determining the scope of the recall repair obligation," on the ground that the Senate Committee's explanation related only to an earlier version of § 207. App. A-20 (*en banc* majority).[21]

The Court of Appeals' analysis of the Senate Report, if correct, means that there is no relevant legislative history to disclose Congress' intent on the particular question whether a

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[21] Judges Bazelon, Tamm and Wilkey in dissent strongly disputed the majority's rejection of this legislative history. App. A at 40-41. Moreover, on October 26, 1984, in a different case, a D.C. Circuit panel ruled that the same legislative history *should* guide the court's interpretation of § 207(c)(1) because it dealt with a provision of the Senate bill "substantially the same as what is before us." *Center For Auto Safety* v. *Ruckelshaus*, 747 F.2d 1, 5. In that same passage, the court noted that the Senate Committee reporting the bill described this subsection as a "recall" provision. *Id.* at 5-6. Thus, in the space of seven weeks, the D.C. Circuit characterized the same legislative history inconsistently as "irrelevant" to the recall provisions of § 207(c) *and* as primary authority for determining the meaning of that section.

vehicle subject to notification must be repaired even though it has passed its useful life.[22] Indeed, EPA's own position in promulgating the regulation was that "[t]he legislative history of the Act offers little guidance" regarding the scope of the remedy. 45 Fed. Reg. at 36397.

Accepting *arguendo* EPA's characterization, the various formulations of GM, EPA and the Court of Appeals judges merely represent alternative resolutions of an issue not spoken to by Congress. By rejecting other alternatives and adopting its own approach, EPA necessarily has added substantive content to § 207(c)(1) and exercised delegated legislative rulemaking authority. *See Chevron* v. *NRDC*, 104 S. Ct. at 2782-83, 2793; *see also* pages 13-14 *supra*. For as Judge Bazelon aptly explained for the panel majority, "if the agency wishes to fill in interstices created by [this] congressional failure * * * the proper recourse is a legislative, not an interpretative, rule." App. B-35.

2. EPA's Regulation Conclusively Resolved Legislative Policy Issues In Order To Expand The Scope Of The Recall Program.

The agency "record" reveals, as the court below correctly discerned, that EPA's purported interpretative rule is predicated on substantive policy determinations made by the agency, not Congress. When "interpretation" of the law depends upon an agency's choice among alternative enforcement schemes for implementing a statute and reconciliation of "competing views of the public interest," the product of that

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[22] The court's conclusion left only broad policy arguments and general statements in the legislative history concerning the duty to notify owners of potentially nonconforming vehicles as justifications for upholding EPA's construction that repair liability is unlimited. *See* App. A at 14-17, 20-22. But the legislative history cited by the *en banc* majority merely confirms the statutory text requiring that all owners of vehicles in the class be notified. *See* page 16 *supra*; App. A-16. That legislative history says nothing about whether, after the notification, the remedy must also be class-based, as EPA contends, thus requiring repair of vehicles to which the § 202 standards no longer apply.

deliberation is a legislative regulation. *See, e.g., Chevron* v. *NRDC*, 104 S. Ct. at 2793.

The D.C. Circuit pointedly emphasized the policy choices motivating adoption of EPA's regulation. The court's rehearing order specifically directed the parties to file supplementary briefs focusing in part on:

> "the comparative benefits or deficits of the remedial schemes set forth in the EPA rule, and Judge Wilkey's and Judge Bazelon's panel opinions, in light of the statutory language and purpose." Order, April 3, 1984. App. C-4.

Indeed, the *en banc* majority even grounded its decision on respect for the policy choices the agency had made:

> "the dissent's extensive dicta, setting out what it dubs 'some reasonable alternatives,' *see* Diss. Op. at 20-24, is particularly inappropriate in light of the Supreme Court's recent warning that reviewing courts should respect the policy choices of administrative agencies. *See Chevron*, slip op. at 27-28." App. A-11 n.8.

The substantive policy determinations motivating EPA are similarly revealed by the materials EPA prepared to support its regulation. As a conclusion of general policy, EPA reasoned that more vehicles would be repaired if manufacturers bore the expense instead of car owners. App. H-4. EPA further concluded that a repair obligation not limited to useful life would add economic incentives for improved emissions control technology. App. H-7. Moreover, both the EPA staff memorandum and the preamble to the regulation speculated that, absent the requirement imposed by EPA's new regulation, manufacturers would benefit from delays in the administrative process. App. H-7; App. E at 6-7.

For all these reasons, EPA chose a policy of overinclusion, thereby enlarging the repair obligation beyond the statutory useful life. *See* pages 20-21, 27-28 *infra*. In the agency's view, seconded by the Court of Appeals, the public would be "bene-

fitted" if vehicles "can be repaired to decrease their pollution potential even after their useful lives have expired." App. A-21. But because EPA gave no notice and allowed no comment, the record is devoid of evidence to support the conclusion that the "benefits" of this policy choice outweighed the "deficits."

The need for notice and comment to resolve these and other policy questions is underscored by the fact that EPA's initial regulations implementing § 207(c)(1) were adopted by legislative rulemaking in 1974 after extensive public comments on their impact. 39 Fed. Reg. 44375. The new regulation depends every bit as much on substantive policy choices as the regulations it extended and, being legislative, cannot be adopted without notice and comment.

3. EPA's Regulation Has A Substantial Impact On Manufacturers' Recall Obligations.

The actual and intended impact of EPA's regulation is to impose substantial new obligations on vehicle manufacturers. The regulation mandates that every remedial plan "shall provide" for repair of vehicles "regardless of their age or mileage." App. E-9. By its own terms, the regulation is prescriptive in character and comparable in its impact to numerous other recall requirements of 40 C.F.R. § 85.1803(a).

EPA's regulation avowedly operates to increase substantially the number of vehicles a manufacturer must repair in a recall. *See* pages 27-28 *infra*. But beyond its intended effect, EPA's new regulation will also force repair of vehicles that complied with all legal requirements *throughout* their useful lives. While EPA disclaims any intention of requiring manufacturers to repair vehicles which, although part of a recall class, did not experience a nonconformity during their useful lives, *see* 45 Fed. Reg. 36396, 36397 n.2 (1980), App. E-4 n.2, this apparent concession is illusory. The manufacturer faces a nearly impossible burden in attempting to prove that an older vehicle, nonconforming when presented for repair, first exhibited the nonconformity after its useful life had passed. These

burdens will be especially substantial whenever a recall occurs late in the life of a class and many vehicles are past 50,000 miles.[23]

If any doubt remained, the threat of sanctions for omitting the new provision from a remedial plan proves the regulation's substantial impact. Nothing could state that impact more plainly than EPA's warning to GM that failure to include the new provision "can potentially subject GM to fines of up to $10,000 per vehicle." App. F-4. *See* M. Warren, *supra* note 9, at 371-72 (relying on the Final Report of the Attorney General's Committee on Administrative Procedure). The same intended impact on all manufacturers can be seen more broadly in EPA's characterization of the new requirement as a "nationally applicable regulation." By this designation, EPA explicitly invoked § 307(b) of the Clean Air Act to make the regulation permanently enforceable and immune from subsequent challenge. App. E-7.

II. GUIDANCE FROM THIS COURT IS NEEDED TO RESOLVE CONFUSION IN THE COURTS OF APPEALS OVER THE PROPER APPLICATION OF *CHEVRON*.

Having wrongly classified the challenged regulation as interpretative, the Court of Appeals then committed an equally fundamental error by applying an incorrect standard of judicial review. Specifically, the court below upheld EPA's regulation by extending to it the highly deferential standard of review for legislative regulations announced by this Court in *Chevron* v. *NRDC*, 104 S. Ct. 2778 (1984). This second error independently warrants the exercise of this Court's jurisdiction.

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[23] The regulation contains no time limit for EPA's determination of nonconformity, although EPA's preamble stated that the determination could be made only when at least some vehicles in a class had not passed 5 years or 50,000 miles. *Compare* App. E at 3-4 *with* 40 C.F.R. § 85.1803 Appendix A. In any event, this "limit" does not alleviate the nearly insurmountable burden of proof discussed in the text.

A. The D.C. Circuit Improperly Applied The *Chevron* Standard Of Review To A Regulation That It Characterized As Interpretative.

Chevron held that in reviewing regulations adopted in the exercise of delegated legislative authority, courts must not disturb the agency's "'accomodation of conflicting policies'" provided the regulation "is based on a permissible construction of the statute." *Id.* at 2782, 2783.[24] In *Chevron*, EPA had conducted notice and comment rulemaking to define the term "stationary source" in order to fill a gap left by Congress in the Clean Air Act's nonattainment provisions. In recognition of the agency's authority to formulate policy in implementing the statute, this Court held that the agency's choice of the "bubble" concept was controlling. By its terms, *Chevron* mandates an especially deferential level of review for all policy-based, or legislative, regulations.

The *Chevron* standard contrasts both in its mandatory application and its level of deference with the standard traditionally applicable for the review of interpretative rules. Those rules have been accorded varying degrees of deference, depending upon their ability to persuade the judiciary in its role as the exclusive arbiter of statutory interpretation. As Justice Jackson explained for the Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944):

> "[T]he rulings, interpretations and opinions of the Administrator [are] not controlling upon the courts by reason of their authority, [but] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thorough-

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[24] This holding elaborated the meaning in this context of the familiar "arbitrary and capricious" standard prescribed for notice and comment rulemaking by both the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and § 307(d)(9) of the Clean Air Act.

> ness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Unlike the *Chevron* standard for legislative rules, the *Skidmore* analysis dictates that in many cases an agency's interpretative rule deserves little deference or none at all. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-143 (1976); *Frank Diehl Farms* v. *Secretary of Labor*, 696 F.2d 1325, 1329-31 (11th Cir. 1983); 2 K. Davis, *Administrative Law Treatise*, § 7:13 (2d ed. 1979 & Supp. 1982).[25]

Despite holding that EPA's rule was interpretative, the court below departed from the *Skidmore* analysis. Instead, the court began its review of EPA's "interpretative rule" by stating that in *Chevron* the Supreme Court had "recently outlined our proper task in reviewing an administrative construction of a statute that the agency administers." App. A-11 (*en banc* majority). Emphasizing that standard of special deference, the court held that EPA's rule and the policy determinations underlying it "enjo[y] adequate support" to uphold EPA's interpretation of § 207(c)(1). App. A-23.

The *en banc* dissent, by contrast, found the rule invalid when measured by the standards set out by this Court in *Skidmore*. App. A at 25-26, 46-47. Because EPA's rule did not represent a longstanding or contemporaneous construction or reflect thorough consideration, the dissent found that it deserved little deference. *Id.* at 26-27. Applying the *Skidmore* standard, the dissent concluded that EPA's regulation could not be sustained as an interpretative rule. *Id.* at 43-47. Reflecting the pivotal importance of *Chevron* to its decision, however, the *en banc*

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[25] *See also Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 517 n.13 (1981); *National Distributing Co.* v. *United States Treasury Department*, 626 F.2d 997, 1019 (D.C. Cir. 1980); *Daughters of Miriam Center for the Aged* v. *Mathews*, 590 F.2d 1250, 1258-59 (3d Cir. 1978); *General Electric Co.* v. *OSHA Comm'n*, 583 F.2d 61, 64 (2d Cir. 1978).

majority rejected the dissent's *Skidmore* analysis as conflicting with *Chevron* and failing to "respect [EPA's] policy choices." App. A at 11-12 n.8.

In so holding, the *en banc* majority improperly assumed that this Court intended *Chevron* to overrule *sub silentio* the traditional *Skidmore* standard of review for interpretative rules. Although not explicitly addressed in *Chevron*, the highly deferential standard articulated there cannot have been meant to extend to interpretative regulations. The bubble concept regulation challenged in *Chevron* had been promulgated following extensive notice and comment proceedings. 104 S. Ct. at 2787-90. Before deferring to the agency's policy choices, this Court first concluded that Congress had not expressed any "actual intent," thereby logically excluding from its analysis rules that are interpretative in character. *Id.* at 2781-82 & n.9; *see* pages 13-14 *supra*.

Throughout, this Court's opinion in *Chevron* emphasized the agency's delegated authority to reconcile "conflicting policies," which depends upon consideration of "policy arguments * * * more properly addressed to legislators or administrators, not to judges." *Id.* at 2783, 2793. Such "competing views of the public interest" can only be resolved, after notice and comment procedures afford the public an opportunity to be heard, through legislative rulemaking. *See* page 14 *supra*.

The D.C. Circuit's extension of *Chevron* to interpretative rules thus destroys the longstanding correlation between procedures for adopting regulations and the standards for judicial review of those regulations. Legislative regulations are given a high level of deference because they are adopted pursuant to notice and comment procedures that allow public participation to inform the agency's judgment. Interpretative rules, adopted without notice and comment rulemaking, receive less deference with the judiciary remaining the arbiter of statutory interpretation. *Bethlehem Steel Corp.* v. *Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984) ("the broad deference that reviewing

courts must give" under *Chevron* "makes it particularly important" that proper procedures be followed).[26] The D.C. Circuit's decision upsets this balance by allowing an agency's regulation implementing substantial policy determinations to be treated as interpretative and hence exempt from procedural safeguards while, at the same time, according it the high level of deference reserved for rules adopted with the benefit of public comment.

B. The Decision Below Conflicts With Other Circuits' Decisions As To The Applicability Of *Chevron*.

Even without a conflict among the circuits, the D.C. Circuit's extension of *Chevron* would be sufficiently important to merit this Court's review by certiorari. The decision here to apply the *Chevron* standard to interpretative rules was rendered by the Court of Appeals *en banc* and thus will govern that court's review of interpretative rules in all future cases. Not only does the D.C. Circuit receive the vast majority of petitions for review of agency regulations, but under the Clean Air Act and many other statutes, it is the only circuit where those regulations may be reviewed. Section 307(b). *See Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 535-37 n.14 (1978). In addition, because of the D.C. Circuit's preeminence in deciding issues of administrative law, its holding is likely to influence the decisions of other circuits.[27]

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[26] *See also* cases cited at page 23 and n.25 *supra*. The more rigorous judicial scrutiny for interpretative regulations was one of the factors cited for exempting them from the general notice and comment requirements of rulemaking. *See* Legislative History of the APA, S. Doc. 248, 79th Cong., 2d Sess. 18 (1946).

[27] *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. at 535-37 n.14 (the decision by the D.C. Circuit "in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals").

Although *Chevron* was decided just last Term, the Courts of Appeals already are split over whether it applies to interpretative rules. The Ninth Circuit appears recently to have joined the court below in saying that *Chevron* applied to a regulation treated procedurally as interpretative.[28] *Alcaraz* v. *Block*, 746 F.2d 593, 606 (1984).

By contrast, the First and Second Circuits have declined to extend *Chevron* to interpretative rules. Thus, in *Capitano* v. *Secretary of Health & Human Services*, 732 F.2d 1066, 1076 (1984), the Second Circuit rejected the agency's argument that a Social Security Ruling, promulgated without notice and comment, should be given "authoritative effect" under *Chevron*. The court held that the highly deferential *Chevron* standard of review applies only to legislative, not interpretative, regulations. Similarly, the First Circuit has held in *New England Telephone & Telegraph Co.* v. *Public Utilities Comm'n*, 742 F.2d 1, 11 (1984), that *Chevron* is limited to determinations reflecting "agency policy," and does not apply to issues of statutory interpretation reserved to the judiciary.[29]

Accordingly, both the significance of the lower court's extension of *Chevron* to interpretative rules and the conflict among circuits as to the applicability of *Chevron* require plenary resolution of the issue by this Court.

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[28] *See also Livermore* v. *Heckler*, 743 F.2d 1396, 1408 (9th Cir. 1984)(Sneed, J., dissenting) (relying on *Chevron* in connection with review of a regulation interpretative in nature).

[29] Intertwined with this dispute is the related question raised by the D.C. Circuit and the First Circuit whether the appropriate standard of judicial review, under *Chevron*, "varies to some degree dependent on whether the statute's delegation of gap filling authority is explicit or implicit." *Rettig* v. *Pension Benefit Guaranty Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984). *See Mayburg* v. *Secretary of Health & Human Services*, 740 F.2d 100, 106 (1st Cir. 1984).

III. THE COURT OF APPEALS' AFFIRMANCE OF EPA'S REGULATION HAS FAR-REACHING AND SEVERE IMPLICATIONS FOR VEHICLE MANUFACTURERS AND ALL OTHER PERSONS SUBJECT TO ADMINISTRATIVE REGULATION.

The agency's "interpretative" regulation, if allowed to stand, will have far-reaching and extraordinarily costly consequences for vehicle manufacturers, none of whom was allowed to comment on its rationale and impact. All motor vehicles sold in the United States since 1970 are subject to the Clean Air Act emissions standards enforced by EPA through its compliance programs. Emissions standards have become progressively more stringent, requiring the development and application of increasingly complex technology designed to achieve compliance with the standards throughout the vehicles' useful lives.[30]

The agency's new regulation significantly expands manufacturers' obligations and liability under this program. Over 22 million vehicles have been recalled to remedy emissions problems since the early 1970's, either voluntarily by manufacturers or by EPA order. Moreover, the rate of emissions recalls has increased since 1980, with annual recall totals escalating from 837,000 in 1979 to more than 3 million in 1983.[31] EPA's regulation, by eliminating the "useful life" limitation on the repair obligation, will increase dramatically the number of vehicles eligible for repair in these recalls. In the Cadillac recall alone,

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[30] The tightening of emissions standards has required reductions for 1984 model year vehicles of 95% for hydrocarbons, 96% for carbon monoxide, and 77% for nitrogen oxides, since the standards first became effective. *See* 40 C.F.R. § 86.084-8 (1984); "Compilation of Air Pollutant Emissions Factors: Highway Mobile Sources," EPA 460/3-81-005, Tables 1.1.2A, 1.1.2B, 1.1.2C (March 1981).

[31] *See* May 9, 1980 EPA Staff Memorandum, Attachment 7. Even greater emphasis on recall enforcement measures, including increased monitoring and testing, is planned for the future. *See generally* EPA, Office of the Comptroller, "Summary of the 1985 Budget," at 17, 19 (January 1984).

for example, GM estimated in 1980 that the new requirement would increase *fourfold* the number of vehicles to be repaired at its expense, nearly 170,000 more vehicles than the statute requires. Ct. Appeals Joint App. at 257–58.

Important as this case is, the implications of the decision below extend far beyond the motor vehicle industry. The legislative-interpretative distinction arises in connection with hundreds of regulations each year. Although the classification may be straightforward in some instances, for many others it depends upon the test applied. When the "interpretative" label is wrongly assigned, all interested parties, ranging from businesses to the disadvantaged, lose the opportunity to be heard in the rulemaking process.

As shown by a number of leading cases, agencies have invoked the "interpretative" rule exception for regulations that sought to alter the standards to qualify for food stamps,[32] eliminate IRS requirements that determine whether hospitals must provide medical services free or at reduced cost for those unable to pay,[33] alter eligibility for AFDC benefits,[34] revise the standards which govern whether non-resident aliens may enter and obtain employment in the United States,[35] change markedly the conditions for approval of new drug products,[36] and eliminate variance provisions from implementation plans under the Clean Air Act.[37] Notwithstanding the nature of

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[32] *Compare Levesque* v. *Block*, 723 F.2d 175 (1st Cir. 1983), *with Alcaraz* v. *Block*, 746 F.2d 593 (9th Cir. 1984).

[33] *Eastern Kentucky Welfare Rights Organization* v. *Simon*, 506 F.2d 1278 (D.C. Cir. 1974).

[34] *Allen* v. *Bergland*, 661 F.2d 1001 (4th Cir. 1981).

[35] *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478 (2d Cir. 1972).

[36] *Pharmaceutical Manufacturers Ass'n* v. *Finch*, 307 F. Supp. 858 (D. Del. 1970).

[37] *Detroit Edison Co.* v. *EPA*, 496 F.2d 244 (6th Cir. 1974).

these agency actions and the severity of the consequences for those affected, the decision below would allow such regulations to be adopted without notice and comment and then to be upheld on the merits based on deference to the agencies' policy choices. Only this Court's guidance can reconcile the conflicting approaches among the Courts of Appeals and maintain adherence to the procedural safeguards that should be followed when agencies engage in legislative decisionmaking having such sweeping repercussions for the public.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

William L. Weber, Jr.
George F. Ball
Thomas L. Arnett
GENERAL MOTORS CORPORATION
3044 West Grand Blvd.
Detroit, Michigan 48202
(313) 556-4009

Theodore Souris
James A. Smith
Terrence B. Larkin
Robert M. Spence
BODMAN, LONGLEY & DAHLING
34th Floor
100 Renaissance Center
Detroit, Michigan 48243
(313) 259-7777

Edward W. Warren
(Counsel of Record)
David G. Norrell
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5018

Attorneys for Petitioner General Motors Corporation
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